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No. 91-1550

In the Supreme Court of the United States

OCTOBER TERM 1991

THOMAS MCCLEARY,

Petitioner,

V.

JOSE G. NAVARRO AND ESPERANZA C. NAVARRO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH APPENDIX

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Petitioner's presentation of the questions presented for review is incomplete. Two additional questions, which are sub-questions of those petitioner presents, as well as more central to effective review, and which neither this Court nor the Ninth Circuit have ever answered, are:

1. Was the petitioner's act of ascertaining the correct location description of the criminal suspect's home a "discretionary" function, rather than a ministerial one, sufficient to invoke qualified immunity at all, in view of this Court's immunity jurisprudence since Harlow v. Fitzgerald, 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727 (1982) and Westfall v. Erwin, 484 US ___, 98 L ed 2d 619, 627, 108 S Ct ___ (1988)?

2. Does the particularity requirement of the warrant clause of the Fourth Amendment impose upon police officers a "duty to investigate" to insure the accuracy of the particularized description of residence to be searched, in view of the reasoning of this Court in Marron v. United States, 275 US 192, 72 L Ed 231, 236 (1927) and Maryland v. Garrison, 480 US 79, 94 L Ed 2d 72, 80-83, 107 S Ct 1013 (1987)?

3. Is "constitutional negligence" the liability standard, as respondent asserts, in a Section 1983 action alleging injury resulting from a police officer's failure to comply with the particularity requirement of the warrant clause of the Fourth Amendment, in view of this Court's letting stand the Second

Circuit's "constitutional negligence" holding below under the probable cause requirement of the warrant clause in Malley v. Briggs, 475 US 335, 341, 89 L ed 2d 271, 106 S Ct 1092 (1986)?

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OPINIONS BELOW

Petitioner correctly references the opinions below, except that the Ninth Circuit opinion has now been published as Navarro v. Barthel, 952 F.2d 331 (9th Cir. 1991).

STATEMENT OF JURISDICTION

Petitioner correctly states the Court's jurisdiction under Mitchell v. Forsyth, 472 US 511, 528, 86 L Ed 2d 411, 105 S Ct 2806 (1985) only if he is correct in asserting no material fact issues exist on the immunity question. However, because petitioner argues such fact issues do exist, this interlocutory appeal is inappropriate. Moreover, respondents contend that this Court should make more explicit the restrictions on collateral review available under Mitchell.

STATEMENT OF THE CASE

Respondents accept petitioner's rendition of the basis of jurisdiction in the lower courts, and the non-argumentative portions of the procedural history. However, respondents take issue with petitioner's statement of the material facts.

Petitioner's Statement of Procedural History: As to the argumentative portions of the procedural history, Detective McCleary states that "the trial court agreed that the warrant was valid and based upon probable cause". This statement has been misperceived by petitioner. While the trial judge did say that the erroneous particularity was "not the fault of the warrant *** but the fault of the informant", this falls short of a finding of validity. The trial judge may have expressly declined to make

that ruling: "The question is not whether the warrant was invalid". (Opinion & Order, p.6).

Petitioner's Summary of Material Facts: As to the petitioner's statement of material facts, if the particularity requirement of the Fourth Amendment imposes no meaningful duty to investigate to insure the correctness of the location description, then respondent accepts petitioner's statement of the facts.

Respondents' Supplemental Summary of Material Facts:

If there is a constitutional duty under the Warrant Clause to investigate, then petitioner has misperceived the record below in asserting that there are no fact questions to be resolved in determining the immunity issue. The following is a supplement to the material facts stated by petitioner:

The respondents surname is "Navarro". They live on an unnamed road, in an unnumbered green-colored house surrounded by a chain link fence. Their neighbors have the surname "Villas". They live next door on the same unnamed road, also in an unnumbered house, but which is distinguishable by many features, including the facts that it is yellow-colored and fronted by a white picket fence. The Navarros' home was searched pursuant to a warrant expressly directed at the home of "Villas", but with a location description consisting only of geographically oriented terms like "the second house on the right" down the "center driveway". This description omitted references to house color, fences, and other distinguishing features.

During discovery, Detective McCleary declined or was unable to point out any mitigating circumstances which precluded him from inserting more individualized location detail in his affidavit and warrant. He had days to get the description right. He had already disregarded a warrant for the same search issued by the first state judge before presenting a second warrant to a second state judge days or weeks later. The notes of fellow officers attending the pre-raid meeting with Detective McCleary in the morning reference house color and fence type, yet when Detective McCleary appeared before the second judge at 2:00 p.m. later that day he omitted these references. Not even clerical pressures were present, since Detective McCleary's sworn tape-recorded presentation for the warrant was oral.

Notwithstanding his sworn denials, another police officer swore in his deposition that petitioner during the morning had committed to other officers to obtain clarification of the residence description, but he never did so. Despite his claims of inability to do so, petitioner could have photographed the homes from the ground or from the air (as respondents did in providing the Appendix photograph), and then asked the informant to point to the correct house.

REASONS FOR NOT GRANTING THE WRIT

1. The writ should not be granted because the petition for it misperceives the Ninth Circuit's holding as to unresolved questions of material facts.

The trial judge found it to be a jury question whether Detective McCleary could have reasonably declined to ask the informant for clarification or to otherwise ascertain any mistakes or omissions in his description. The respondents argued this below as the "duty to investigate" implied by the particularity requirement of the Warrant Clause of the Fourth Amendment. Although not expressly so stating in its per curiam, the Ninth Circuit should fairly be understood to have remanded as the jury question not an immunity issue of objective reasonableness, but a core fact issue of what investigative tools were reasonably available to petitioner in getting the house description correct.

Petitioner misunderstands the following holding of the Ninth Circuit:

> Rather, we agree with the district court that the question in this case is whether a police officer in McCleary's position would reasonably have described the location with sufficient particularity to direct those executing the warrant to the correct house on the right. [Court's emphasis].
>
> Accordingly, we do not see this as a claim based on judicial deception such that the Franks test is triggered. The Warrant Clause categorically protects against unreasonable searches of places inadequately described. Maryland v. Garrison, 480 U.S. at 84, 107 S.Ct. at 1017. The district court therefore correctly determined that it is for the jury to decide whether McCleary acted reasonably, based on the information

> about the layout of the Tallow Company premises that he knew or should have known, to assure that the wrong place was not searched.

Navarro, supra at 952 F.2d 333. Nowhere in this holding does the Ninth Circuit suggest that the immunity question, per se, is for the jury. The holding does not even use the word "immunity". Instead, a fair reading of the holding in context is that the jury is to decide the disputed fact questions of what petitioner "knew or should have known" regarding the location description of the correct house.

2. The writ should not be granted because the petition for it misperceives the act of ascertaining a location description as a discretionary function, when it is only a ministerial one not invoking immunity defenses at all.

While determinations as to the existence of probable cause and what facts adequately support it may well require exercise of discretion, the procedural requirements of the Warrant Clause of the Fourth Amendment do not. For example, the requirement that an officer present his facts in sworn form is clearly a ministerial rather than discretionary function. In the present case, the officer's determination that the suspect was probably selling drugs which were kept in his home required the use of discretion. But ascertaining the correct location description of the house is ministerial. While this task might in some extreme circumstances be a discretionary function, it is ministerial when routine and available methods of location description are at the officer's disposal. On the present record, however, the immunity

claim should be easily dismissed as not implicating a discretionary function.

The procedures required by the Warrant Clause may be analyzed in five components: (1) The showing of probabie cause requires setting forth facts regarding the unlawful conduct and its relation to the place to be searched. (2) Apart from the probable cause relationship of the unlawful conduct to the referenced residence, the location of the residence itself must be particularly described. (3) All facts and descriptions can only be shown by sworn statements. (4) These sworn statements must be presented to a judge or judicial officer. (5) The judge or judicial officer must actually issue a warrant containing a particular or individualized description of the location of the residence.

The qualified immunity defense may be asserted only when the conduct under scrutiny is a discretionary, non-ministerial function:

> Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. *** We therefore hold that government officials performing discretionary functions generally are shielded from liability *** [by qualified immunity]. [Emphasis added].

Harlow v. Fitzgerald, supra at 73 L Ed 2d 409-10. Most officials perform both discretionary and ministerial functions, and these must be distinguished when considering immunity. In Westfall v.

Erwin, 484 US ___, 98 L ed 2d 619, 627, 108 S Ct ___ (1988), the Court explained:

> [P]etitioners contend that *** the requirement is satisfied as long as the official exercises "minimal discretion" If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" ***. We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.

In order to resolve an officer's claim of immunity, the court should give "consideration of the discretionary nature of the defendant's acts". Saul v. Larsen, 847 F2d 573, 576 (9th Cir. 1988) (remanding tort and constitutional claims to district court to take evidence for this determination). Not all acts of law enforcement officers are of a discretionary nature. Garcia v. U.S., 826 F2d 806, 809 (9th Cir. 1987), Deary v. Evans, 570 F Supp 189, 199 n. 17 (D. Vig. Is. 1983) ("some of their functions are purely routine and ministerial"). As stated in Restatement Law of Torts 2d, Immunities, sec. 895D, comment h, "Ministerial acts:

> If an act of the official involves less in the way of personal decision or judgment ***, there is no immunity or privilege. *** Ministerial acts are those done by officers *** to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done.

While "the details of how best to proceed with the performance of a search" is "generally left to the discretion of the executing officers", Dalia v. United States, 441 US 238, 60 L Ed 2d 177, 192, 99 S Ct 1682 (1979), a simple "execution of an

arrest warrant is a ministerial rather than a discretionary function". Kane v. Anderson, 509 A2d 656, 657 (Me. 1986).

3. The writ should not be granted because the petition for it is based upon an erroneous view that police officers have no duty to investigate under the particularity requirement of the Warrant Clause of the Fourth Amendment.

In Franks v. Delaware, 438 US 154, 57 L Ed 2d 667, 677-78, 98 S Ct. 2674 (1978) the Court noted that the "bulwark of Fourth Amendment protection, of course, is the Warrant Clause". In United States v. Leon, 468 US 897, 82 L Ed 2d 677, 692-93, 104 S Ct 3405 (1984), the Court emphasized that the Warrant Clause "is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" The Warrant Clause has repeatedly been held to necessarily imply that police seeking search warrants have a "duty to investigate" and ascertain accurate location information.

In United States v. United States District Court, 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125 (1972), the Court reiterated the historical context of the Warrant Clause's relationship to the duty to investigate:

> Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures", the definition of "reasonableness" turns at least in part, on the more specific commands of the warrant clause. *** The warrant clause of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be

> somehow 'weighed' against the claims of police efficiency. It is, or should be, an important part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly overzealous *** officers who are a part of any system of law enforcement". [Citations omitted].
> ***
> Lord Manfield's formulation [of over two centuries ago] touches the very heart of the Fourth Amendment directive: that where practical, a government search and seizure should represent both the efforts of the officer to gather evidence *** and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises ***.

Id. at 32 L Ed 2d 765-66. Thus, the duty to investigate is not a perfunctory and independent restriction on police activity; it is a historic and integral component of the Fourth Amendment.

The duty to investigate and ascertain location particularly has more recently been considered by the Court in Maryland v. Garrison, 480 US 79, 94 L Ed2d 72, 80-83, 107 S Ct 1013 (1987). The required degree of particularity of a location description will depend upon the facts available to the police at the time they apply for a warrant, and additional facts learned prior to or during its execution. The Court explained the rationale of this holding:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."
>
> Plainly, if the officers had known, or even if they should have known [of their mistake],***they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. ***
>
> [T]he validity of the search***pursuant to a warrant authorizing the search***depends on whether the officers' failure to realize the overbreadth of the

> warrant was objectively understandable and reasonable. [Emphasis added].

Based upon the facts found by the Maryland trial court in the suppression hearing, the Court concluded that the search in that case was not offensive to the Warrant Clause. However, the Court conditioned this conclusion on the facts of that case:

> Here [the mistaken search] unquestionably was [objectively understandable and reasonable]. The objective facts available to the officers at the time suggested no distinction [between the two residences]***. [T]he officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment. [Emphasis added].

Based on this reasoning, it is plainly a fact question for a jury to decide what investigation the petitioner undertook, as well as what additional investigative steps were reasonably available to him.

4. The writ should not be granted because the petition for it is based upon an erroneous view that a Section 1983 action under the particularity requirement of the Warrant Clause requires a culpability showing at or above the level of "reckless disregard", rather than "constitutional negligence".

The Fourth Amendment right to be free from unreasonable searches or seizures, in its two century old generality, is the right upon which the Navarros section 1983 action is based. As set forth in Marron v. United States, 275 US 192, 72 L Ed 231, 236 (1927):

> The 4th Amendment declares that the right to be secure against unreasonable searches shall not be violated, and it further declares that "no warrants shall issue

> but upon *** oath or affirmation, and particularly describing the place to be searched ***". General searches have long been deemed to violate fundamental rights *** since they placed "the liberty of every man in the hands of every petty officer".

As more recently stated in Maryland v. Garrison, 480 US 79, 94 L ed 2d 72, 80-81, 107 S Ct 1013 (1987):

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the person or things to be seized". The manifest purpose of this particularity requirement was to prevent general searches. [Emphasis added].

The concern of the Framers was not with the particular laws that were to be enforced by this police power, but with its indiscriminate exercise. General warrants were probably quite effective in locating the contraband sought, but at the expense of many "wrong houses" being invaded in the process.

The requirement of particularity serves the obvious end of bringing accuracy to police targeting of the locations intended to be searched. As simply noted in Massachusetts v. Sheppard, 468 US 981, 82 L Ed 2d 737, 743 n.5, 104 S Ct 3424 (1984):

> The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. [Citations omitted].

Unlike the procedural due process clause of the Fourteenth Amendment, section 1983 claims based on the Fourth Amendment carry no requirement to allege or prove intentional conduct. This Court has yet to determine the threshold showing which plaintiffs must make in Fourth Amendment actions. The question

is open in some circuits, but not in the Ninth. In Borunda v. Richmond, 885 F2d 1384, 1391 (9th Cir. 1988), the court rejected the police position that a prima facia case under section 1983 requires conduct beyond "simple negligence". The court stated that this "argument misperceives the constitutional deprivation alleged", and held that:

> In Daniels v. Williams, 474 US 327 *** (1986) and a companion cases, Davidson v. Cannon, 474 US 344 *** (1986), the Supreme Court held that mere negligence could not constitute a "deprivation" of life, liberty or property under the fourteenth amendment. Contrary to appellant's assertion, this holding has little relevance to a section 1983 action involving fourth amendment rights.

To the same effect is the view of the other circuits. In McKay v Hammock, 730 F.2d 1367, 1373 n. 5 (10th Cir. 1984) the court held:

> Thus, an intent requirement is not part of a section 1983 action unless the action is based on a constitutional provision which itself incorporates an element of scienter.

In Briggs v. Malley, 748 F2d 715, 719-20 (1st Cir. 1984), aff'd 475 US 335, 89 L Ed 2d 271, 106 S Ct 1092, the court exhaustively studied the relationship between substantive Fourth Amendment standards and qualified immunity. In the most direct terms, the court held "constitutional negligence" to be actionable under section 1983:

> The objective reasonableness standard should be understood to prohibit conduct which is "constitutionally negligent". This reading of Harlow is supported by the Supreme Court's holding in Parratt v. Taylor [citation omitted], that negligent deprivations of constitutional rights are actionable under section 1983.

> ***
> This argument [that a negligence standard will chill zealous law enforcement] overlooks the fact that under our system of government, the police have a duty to fight crime without violating constitutional rights. This is difficult at times, but it is what the constitution requires. If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea of a rule of law. The exercise of police power within the law is the very foundation of the social contract. We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds. [Emphasis added].

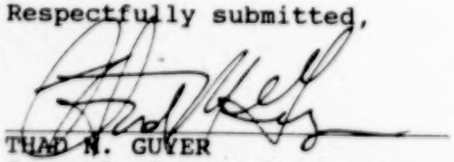
This Court left the foregoing First Circuit holding intact.

Detective McCleary argues that the Navarros can recover only upon meeting a standard of "deliberate falsity" or "reckless disregard" under Franks v. Delaware, 438 US 154, 98 S Ct 2674, 57 L Ed 2d 667, 672 (1978). The sole thrust of the Franks holding was to provide criminal courts with a procedural method for applying the exclusionary rule when a defendant claims that probable cause is based upon an affidavit wrought with knowing or reckless falsehoods, to wit, "judicial deception" cases as the Ninth Circuit call them. To the extent that a civil claim is limited to that scenario, Franks may provide the applicable section 1983 standard for qualified immunity, but not for the substantive Fourth Amendment violation itself. This Court's decision in Franks neither attempted to nor resulted in (1) articulation of overarching civil liability standards for Fourth Amendment violations, nor (2) criminal or civil standards for Fourth Amendment violations not concerned with probable cause.

CONCLUSIONS

The trial judge's order denying summary judgment to Detective McCleary was properly affirmed. Unlike Hunter v. Bryant, 502 U.S. ___, 116 L Ed 2d 589, 112 S. Ct. 534 (1991), this is not a case where the courts below have held that a jury should decide the immunity question. Instead, the Ninth Circuit remanded to the jury disputed fact questions which must be decided before the immunity questions is ultimately resolved. Moreover, there should never be any ultimate grant of qualified immunity because no discretionary function by petitioner is involved. The case should be resolve at trial on a standard of "constitutional negligence" wherein the jury decides whether petitioner reasonably discharged his duty to investigate under the Warrant Clause of the Fourth Amendment.

Respectfully submitted,



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APPENDIX

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April 24, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Francis J. Lorson
Chief Deputy Clerk
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One First Street, N.E.
Washington, D.C. 20543

RE: Thomas McCleary v. Jose G. Navarro and Esperanza C. Navarro; U. S. Court of Appeals Docket No. 90-1550

Dear Mr. Lorson:

Please find enclosed for filing with the Court the original and twelve copies of Respondents' Motion to Appear in Forma Pauperis, Affidavit, and Brief in Opposition to Petition for Writ of Certiorari with Appendix. Also enclosed is a Certificate of Service indicating that I have served two copies of the Motion, Affidavit, and Brief upon opposing counsel, Robert E. Franz, Jr., by mailing said documents to them on Friday, April 24, 1992.

Thank you for your courtesies and assistance.

Sincerely yours,

Thad M. Guyer

TMG/jp
Enclosure

cc: Robert E. Franz, Jr.
Jose and Esperanza Navarro

No. 91-1550

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 29.3., I served a copy of Respondents' Motion to Appear In Forma Pauperis, Affidavit, and Brief in Opposition to Petition for Writ of Certiorari with Appendix on Petitioner, Thomas McCleary, by depositing said copies in the United States Mail in Medford, Oregon, Friday, April 24, 1992, enclosed in a sealed envelope, with postage paid and addressed to his attorney, Robert E. Franz, Jr., P. O. Box 10733, Eugene, Oregon 97440.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 29.3., I served three copies of Petitioners' Writ of Certiorari with Appendix on Respondents, Jose G. Navarro and Esperanza C. Navarro, by depositing said copies in the United States mail in Eugene, Oregon, Wednesday, March 25, 1992, enclosed in a sealed envelope, with postage paid and addressed to their attorneys, Eugene Piazza and Thad Guyer, 221 W. Main Street, Suite 1, Medford, Oregon, 97501.

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